

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 13-011**

**JOHN KING,  
Claimant–Petitioner,**

**v.**

**JOHN E. KELLY & SONS and SELECTIVE INSURANCE CO.,  
Employer/Carrier-Respondent.**

Appeal from a Compensation Order by  
Administrative Law Judge Leslie A. Meek  
AHD No. 12-230A, OWC No. 686743

Daniel P. Moloney, Esquire, for the Petitioner  
Karen Kerr, Esquire, for the Respondent

Before MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. John King is an electrician for John E. Kelly & Sons (“Employer”); he works on projects in Maryland, Virginia, and the District of Columbia. Mr. King is a resident of Maryland; his contract of hire was entered into in Maryland; Employer furnished workers’ compensation insurance that covers Mr. King’s employment activities while he is in the District of Columbia. On November 3, 2011, Mr. King was injured while working on a job in the District of Columbia.

Mr. King asserted an entitlement to benefits pursuant to the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* (“Act”), and at a formal hearing, the only issue for resolution was jurisdiction. In a Compensation Order dated January 8, 2013, an administrative law judge (“ALJ”) ruled that Mr. King’s employment in the District of

Columbia is temporary and intermittent and that the Administrative Hearing Division (“AHD”) lacks jurisdiction over his claim.<sup>1</sup>

On appeal, Mr. King contends jurisdiction lies in the District of Columbia because he “was injured in the District of Columbia and had spent more than 40% of his time employed in the District of Columbia in the year preceding the accident.”<sup>2</sup> Mr. King asserts a one year time period is the proper period for determining whether he worked on a regular basis in the District of Columbia.

In opposition, Employer asserts the ALJ considered the totality of the evidence for the periods 90 days, 6 months, 8 months, and 1 year prior to Mr. King’s accident when determining his work in the District of Columbia is not sufficient to confer jurisdiction here. Employer also asserts Mr. King’s claim for benefits in the District of Columbia is barred by his receipt of Maryland workers’ compensation benefits.

#### ISSUES ON APPEAL

1. Is the ALJ’s determination that Mr. King’s employment in the District of Columbia is temporary or intermittent supported by substantial evidence and in accordance with the law?
2. Does AHD lack jurisdiction over Mr. King’s claim for benefits because he received Maryland workers’ compensation benefits for this injury?

#### ANALYSIS<sup>3</sup>

D.C. Code §32-1503(a-3) exempts from the provisions of the Act an employee and his employer who are not residents of the District of Columbia and whose employment contract was entered into in another state “while such employee is temporarily or intermittently within the District of Columbia doing work for such nonresident employer” so long as the employer “has furnished workers’ compensation insurance coverage under the workers’ compensation or similar laws of such other state, so as to cover such employee’s employment while in the District of Columbia.”<sup>4</sup>

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<sup>1</sup> *King v. John E. Kelly & Sons*, AHD No. 12-230A, OWC No. 686743 (January 8, 2013).

<sup>2</sup> Claimant’s Memorandum of Points and Authorities in Support of Application for Review at unnumbered p. 2.

<sup>3</sup> The scope of review by the Compensation Review Board (“CRB”) is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>4</sup> Section 32-1503(a-3) of the Act reads:

An employee and his employer who are not residents of the District of Columbia and whose contract of hire is entered into in another state shall be exempted from the provisions of this chapter while such employee is temporarily or intermittently within the District of Columbia doing

The ALJ ruled Mr. King is not entitled to workers' compensation benefits pursuant to the Act because the District of Columbia lacks jurisdiction over his claim; therefore, at issue here is the ALJ's interpretation of §32-1503(a-3) of the Act.

Mr. King has worked for Employer for more than six years. He was injured on November 3, 2011, and when analyzing whether Mr. King's work in the District of Columbia was temporary or intermittent, the ALJ considered multiple time periods:

- In the year preceding Mr. King's accident, a majority of his hours were spent in Maryland.<sup>5</sup>
- Mr. King's work was restricted to the District of Columbia from January 4, 2011 to March 15, 2011.<sup>6</sup>
- From November 6, 2010 to November 3, 2011, Mr. King worked 235 hours in Virginia, 859 hours in the District of Columbia, and 935 hours in Maryland.<sup>7</sup>
- In the 3 months prior to the accident, Mr. King's "work in the District was substantially lower than the hours he worked in Maryland."<sup>8</sup>
- The majority of Mr. King's time was spent in Maryland during the 90 days preceding his accident.<sup>9</sup>
- From August to October 2011, Mr. King worked 17 hours in Virginia, 98 hours in the District of Columbia, and 417 hours in Maryland.<sup>10</sup>
- The longest period of continuous work Mr. King performed in the District of Columbia was for 50 days from January 4, 2011 to March 15, 2011.<sup>11</sup>

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work for such nonresident employer, if such employer has furnished workers' compensation insurance coverage under the workers' compensation or similar laws of such other state, so as to cover such employee's employment while in the District of Columbia. The benefits under this chapter or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in the District of Columbia.

<sup>5</sup> *King*, *supra*, at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

The ALJ then concludes

[f]ifty consecutive days of work in the District, eight months before the work injury does not constitute continuous work in the District. Claimant's work was split between the three districts of Maryland, Virginia and the District, while the majority of his work hours were spent in Maryland. Claimant's work in the District was temporary and intermittent.<sup>[12]</sup>

Previously, in order to confer jurisdiction in the District of Columbia, the Act required a claimant's employment be "principally localized" here, regardless of the location of the work-related accident. That requirement was eliminated in 1991.

Presently, in order to assess Mr. King's employment in the District of Columbia, *Adjei v. Department of Employment Services*<sup>13</sup> requires more than a cursory finding that the injured worker's employment is "occasional" or "not continuous." In *Adjei*, the Court of Appeals adopted the analysis that the Act requires qualification and quantification of the actual time in the District of Columbia as opposed to describing employment as a whole.<sup>14</sup> *Adjei* does not require a majority of a claimant's work hours be spent in the District of Columbia in order for jurisdiction to vest here; consistent with the plain language of the Act, *Adjei* only requires the claimant's work hours not be temporary or intermittent. The ALJ has not applied the *Adjei* standard properly, and the various findings of fact do not lead to but one conclusion; therefore, the law requires we remand this matter for additional analysis.

As for Mr. King's argument that the year preceding his accident is the applicable time period for analysis, neither the Act nor caselaw specifies a time period during which consideration must be given; therefore, an ALJ must make findings of fact and conclusions of law as to a reasonable time period. Then, within that reasonable time period, the ALJ must reach a conclusion of law as to whether the employment is temporary or intermittent.

Finally, at the formal hearing, Employer raised the defense that pursuant §32-1503(a-1) of the Act,<sup>15</sup> Mr. King's claim for benefits in the District of Columbia is barred because he received Maryland workers' compensation benefits for this injury. Although this issue may be subsumed in the general question of jurisdiction, it is not addressed in the Compensation Order. Of course, based upon the ALJ's ruling in the Compensation Order, the particulars of this jurisdictional defense were moot; however, on remand, if the ALJ determines Mr. King's employment vests jurisdiction in the District of Columbia, this defense still will need analysis.

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<sup>12</sup> *Id.*

<sup>13</sup> *Adjei v. Department of Employment Services*, 817 A.2d 179 (D.C. 2003).

<sup>14</sup> *Id.* at 180.

<sup>15</sup> "No employee shall receive compensation under this chapter and at any time receive compensation under the workers' compensation law of any other state for the same injury or death."

CONCLUSION AND ORDER

The findings of fact in the January 8, 2013 Compensation Order are not supported by substantial evidence; the conclusions of law in the January 8, 2013 Compensation Order are not in accordance with the law; and the Compensation Order is VACATED. This matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES

*Administrative Appeals Judge*

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August 7 2013

DATE